UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT LEE CAVER,

Petitioner, Case Number: 00-70903

v. HONORABLE ARTHUR J. TARNOW

DENNIS STRAUB,

Respondent.
_____/

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS[1]

I. Introduction

Petitioner Robert Lee Caver is a Michigan state prisoner. He has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he is incarcerated in violation of his constitutional rights. The Court grants the petition for a writ of habeas corpus because Petitioner was denied counsel at a critical state in the proceeding: when the jury was reinstructed.

II. Facts

Petitioner's conviction arises out of events that occurred on the afternoon of February 8, 1992, at a house on 13935 Greenview Street, in the City of Detroit. Daniel Sharp, who lived at that residence, testified that, early in the afternoon of February 8, two men, whom he later identified as Petitioner and co-defendant Travis Thomas, knocked on the front door of his house. Petitioner identified himself and co-defendant Thomas as federal agents, revealed a badge, and told Mr. Sharp that they had a warrant for three or four people, including someone named Dan.

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[1] Staff Attorney Mary Beth Collery provided quality research assistance.

Mr. Sharp told the men he would get his coat. He retreated into the vestibule of the house.

He testified further that Petitioner and Thomas followed him inside the house without permission. The men asked to see the homeowner. Mr. Sharp called for the homeowner, Virgie Steward, to come downstairs. When she did, Petitioner again flashed a badge, identified himself and Thomas as federal agents, and stated that they were investigating a murder and looking for a murder weapon. Ms. Steward then summoned Paul Moorehead, who also lived in the house, from the basement. When he came upstairs, he asked to see the men's identification and search warrant. Ms. Steward then became suspicious of the men, picked up the phone, and told the men she was going to call her lawyer. She dialed the phone, but Petitioner and Thomas told her to put the phone down, which she did. Co-defendant Thomas became very agitated, began using foul language, and threatened that he could summon a squad full of agents at a moment's notice, if Ms. Steward continued to be difficult. During this commotion, Mr. Sharp could hear the sounds of a man running up the stairs and another person running down the stairs of the house. Mr. Sharp testified that, shortly thereafter, Petitioner discovered that Ms. Steward had not hung up the phone when she set it down. He told co-defendant Thomas that they ought to get out of the house quickly. A few moments later, police arrived and arrested co-defendant Thomas and Darwyn Oldham, who, apparently, was one of the other two men Mr. Sharp heard in the house. Petitioner allegedly ran through the backyard, jumped over a fence, and was later apprehended. Once the police arrived, Mr. Sharp walked through the house with a police officer and found that the entire house had been ransacked.

Virgie Steward testified that she was on the second floor of her house on the afternoon of February 8, 1992, when she heard a knock at the front door. She told Mr. Sharp to answer the

door. Shortly thereafter, she went downstairs to the main floor of the house and saw Petitioner and co-defendant Thomas standing in the entryway. After Mr. Sharp told her why the men were in the house, she asked to see the search warrant and some identification. She also called for Paul Moorehead to come upstairs from the basement. Ms. Steward became suspicious of the men, so she told them she was going to telephone her lawyer. In fact, she dialed 911. She testified that co-defendant Thomas ordered her to put the phone down, which she did. However, she did not hang up before placing the phone on the kitchen counter.

Ms. Steward testified that co-defendant Thomas threatened that he would tear the house apart if she and the others did not cooperate. She said he was very belligerent and threatened to shoot her. She also noted that he was carrying a handgun in a shoulder holster. Petitioner and Thomas then shepherded her, her two children, Moorehead, Sharp, and Yvonne Steward into the dining room. Two additional men then came into the house, one went upstairs and one went downstairs. Then, Detroit police officers came to the house, in response to the 911 call. They arrested Thomas and Oldham, but Petitioner fled. Ms. Steward testified that when she had time to inspect the upstairs of her house, she saw that all of the rooms had been ransacked. She also noticed that one hundred and fifty dollars in cash, which had been on a bedroom dresser when she went downstairs, was missing.

Detroit police officer Darryl Bennett testified that, on February 8, 1992, he and his partner, Derrick Dixon responded to a disturbance call on Greenview Street in the city of Detroit. He and his partner arrived at the house and knocked on the front door. They saw a man, later alleged to be Petitioner, fleeing the house through the backyard. The police did not give chase at that time because they were concerned for the safety of the house's occupants. When the police

entered the house, they arrested Thomas and Oldham. Police found a loaded handgun in Oldham's possession. They found a phony search warrant in Thomas's possession. Petitioner was later arrested and identified at trial by Virgie Steward, Daniel Sharp and Paul Moorehead, as one of the men who entered their home on February 8, 1992. The fourth man was never identified or apprehended.

III. Procedural History

Following a jury trial in Recorder's Court for the City of Detroit, Petitioner was convicted of two counts of attempted assault with intent to commit armed robbery and assault with intent to commit armed robbery. Petitioner was jointly tried with Darwyn Oldham and Travis Thomas. On November 6, 1992, he was sentenced to two concurrent sentences of forty to sixty months imprisonment for the attempted assault convictions and twenty to forty years for the assault conviction.

Petitioner filed an appeal of right in the Michigan Court of Appeals, presenting the following claims:

I. Were the trial court's instructions concerning aiding and abetting incomplete, erroneous, and the basis of a miscarriage of justice?

II. Was the evidence of assault sufficient to support a conviction of assault with intent to commit armed robbery?

The Michigan Court of Appeals affirmed Petitioner's conviction. People v. Caver, No. 161354 (Mich. Ct. App. Oct. 18, 1994).

Petitioner then filed a delayed application for leave to appeal in the Michigan Supreme Court, presenting the same claims presented to the Michigan Court of Appeals and the following

additional claims:

III. Ineffective assistance of appellate counselor denied defendant the right to present issues he wanted to raise on direct appeal by right.

IV. Faulty similar acts testimony brought about the evidence's tendency to prejudice the jury which in turn far outweighed any light it may have shed on the case. Thereby, in conjunction with other multiple errors, defendant was denied due process.

The Michigan Supreme Court denied leave to appeal. People v. Caver, 448 Mich. 942 (1995).

Petitioner then filed a motion for relief from judgment in the trial court, presenting the following claims:

I. Defendant was deprived of his right under the Sixth and Fourteenth Amendments to the United States Constitution and under Sections 17 and 20, Michigan Constitution 1963, to due process, a fair trial and equal protection/application of the laws right, to effective assistance of trial and appellate counsel.

II. Defendant was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and under Section 17, Article 1, Michigan Constitution 1963, when the trial judge failed to articulate on the record his reasons for imposing the sentence he imposed, and defendant's sentence is violative of the principle of proportionality standard as enunciated in Milbourn.

III. The trial court erred in failing to require the prosecution to call *res gestae* witness Yvonne Stewart.

IV. Defendant was deprived of his right to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution, and under Article 1, Sections 17 and 20, of Michigan Constitution 1963, when the trial court abused its

discretion and allowed the unsupported, convictionless "similar act" testimony before the jury.

V. Defendant was deprived of a fair trial guaranteed him under the Sixth and Fourteenth Amendments of the United States Constitution, and under Michigan Constitution 1963, Art. 1, Sections 17 and 20, where the trial judge made the factual determination of defendant's role in the charged offenses and inferred this upon the jury during its charge to the jury.

VI. Defendant was deprived of a fair trial guaranteed him under the Sixth and Fourteenth Amendments of the United States Constitution and under Michigan Constitution 1963, Art. 1, Sections 17 and 20, where prosecutorial misconduct tainted the jury's decision.

The trial court denied Petitioner's motion for relief from judgment. People v. Caver, No. 92-2562-03 (Detroit Recorder's Court Jan. 16, 1997).

Thereafter, Petitioner filed applications for leave to appeal the trial court's denial of his motion for relief from judgment in the Michigan Court of Appeals and Michigan Supreme Court. Both state courts denied leave to appeal. People v. Caver, No. 202050 (Mich. Ct. App. March 17, 1998); People v. Caver, 459 Mich. 949 (1999).

On March 2, 2000, Petitioner filed the pending petition for a writ of habeas corpus, presenting the following claims:

I. Ineffective assistance of appellate counsel.

II. Ineffective assistance of trial counsel.

III. Failure to produce endorsed *res gestae* witness.

IV. Admission of similar acts testimony.

V. Because the trial judge factually determined Petitioner's role in the charged offense, she abandoned her judicial

impartiality and refused to instruct on the *mens rea* of aiding and abetting.

The Court subsequently appointed counsel to represent Petitioner in this matter. Appointed counsel filed a supplemental brief clarifying certain of Petitioner's claims as follows:

I. Where Petitioner's appellate counsel was ineffective the cause and prejudice test of Wainwright v. Sykes is met and this Court may review issues not raised on the direct appeal.

II. Petitioner was denied a fair trial when the court reinstructed the jury in his counsel's absence.

III. Where the state courts improperly denied Petitioner's request for an evidentiary hearing on the issue of ineffective assistance of trial and appellate counsel, this Court should schedule a hearing in order to review whether the state court unreasonably applied clearly established federal law.

IV. Petitioner was denied his right to the effective assistance of trial counsel where counsel failed to investigate facts and interview witnesses who would have corroborated the defense theory.

This Court conducted an evidentiary hearing on September 26, 2001, during which Petitioner presented three witnesses: his trial counsel, his appellate counsel, and his purported alibi witness Doris Oldham. The Court will discuss relevant portions of these witnesses' testimony below.

IV. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because petitioner's application was filed after

April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)[2]; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

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[2] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000).

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

With this standard in mind, the Court proceeds to the merits of the petition for a writ of habeas corpus.

V. Analysis

A. Absence of Counsel

Petitioner claims that he was deprived of a fair trial because the trial court reinstructed the jury without his attorney being present. Respondent argues that this claim is barred from review by this Court because it is procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, Coleman, 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust, 17 F.3d at 162; Murray v. Carrier, 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply, a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. Warner v. United States, 975 F.2d 1207, 1213-14 (6th Cir. 1992), *cert.*

denied, 507 U.S. 932 (1993). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." Simpson, 94 F.3d at 202.

If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice in order for the federal court to review the petition. Rust, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

This Court begins its analysis of whether Petitioner's claims are procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claims. *See* Coleman, 501 U.S. at 729-30. The last state court to issue a reasoned opinion addressing Petitioner's claim that the trial court erred in reinstructing the jury in the absence of Petitioner's counsel, the Detroit Recorder's Court, held that Petitioner's claim was barred from review pursuant to Michigan Court Rule 6.508(D)(3), because Petitioner had failed to present the claim on direct appeal and did not establish "good cause" for failing to do so. People v. Caver, No. 92-2562-03 (Detroit

Recorder's Court Jan. 16, 1997).

The Sixth Circuit Court of Appeals has held that M.C.R. 6.508(D) was being strictly and regularly followed as of 1990. Simpson v. Jones, 238 F.3d 399, 407 (6th Cir. 2000). Petitioner was convicted in 1992. Thus, M.C.R. 6.508(D) was strictly and regularly followed when Petitioner was convicted. In addition, the Sixth Circuit Court of Appeals has held that M.C.R. 6.508(D) is an independent and adequate state procedural rule in the context of a procedural default analysis. Id. at 407. Thus, Petitioner's claims are procedurally defaulted unless he can establish cause and prejudice to excuse his procedural default.

Petitioner asserts a claim of ineffective assistance of appellate counsel as cause for his failure to present this claim on direct review. The Supreme Court has held that "cause" under the cause and prejudice standard must be "something external to the petitioner, something that cannot fairly be attributable to him." Coleman, 501 U.S. at 753. The Court further held that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error. . . . Attorney error that constitutes ineffective assistance of counsel is cause, however." Id. at 753-54 (internal citations omitted).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-pronged test for determining whether a habeas petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. Second, a petitioner must show that counsel's deficient performance prejudiced petitioner. A petitioner may establish prejudice by "showing

that counsel's errors were so serious as to deprive the defendant of a fair trial." Id.

The Supreme Court emphasized that, when considering an ineffective assistance of counsel claim, the reviewing court should afford counsel a great deal of deference:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689 (internal citations omitted).

The Court further explained that, to establish deficient performance, a petitioner must identify acts that were "outside the wide range of professionally competent assistance." Id. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The Sixth Circuit, applying the Strickland standard, has held that a reviewing court therefore must focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied* 520 U.S. 1257 (1997).

"[T]here can be no constitutional deficiency in appellate counsel's failure to raise

meritless issues." Mapes v. Coyle, 171 F.3d 408, 413 (6th Cir. 1999). Thus, to determine whether Petitioner received ineffective assistance of appellate counsel, this Court must first examine the merits of Petitioner's ineffective assistance of trial counsel claim. If Petitioner did receive ineffective assistance of trial counsel, "the questions then become whether appellate counsel was constitutionally ineffective for failing to raise those errors on appeal and, if so, whether the petitioner was prejudiced by counsel's unsatisfactory representation." Mapes, 171 F.3d at 413-14 (6th Cir. 1999).

Petitioner claims that he received ineffective assistance of trial counsel, because his trial counsel was not present when the trial judge gave supplemental jury instructions. After deliberating for approximately one hour, the jury sent a question to the trial court judge. The trial court transcript reflects that the trial court judge was confused about the meaning of the jury's question. The transcript also reflects that Petitioner's attorney was not present while the trial court attempted to discern the true nature of the jury's question or when the trial court reinstructed the jury:

> **The Court:** I'm not really certain about this.
> I'm not quite certain about what this note from the jury means. It says definitions of Assault, and False Pretenses. And I'm not quite certain, so I'm going to ask them if they would be kind enough to write down exactly what is on the verdict form.
>
> . . .
>
> Gentlemen, I have written a note.
>
> Where is [Petitioner's attorney] Mr. Simon?
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> **Attorney for co-defendant #1:** I just asked the same question.
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> **The Court:** Nevertheless, I am writing this note:

> "Dear Jurors: I don't quite understand your question. Would you please mark on the verdict form the exact charge or charges that you want." And I'm going to send them a form in there so they can write on here exactly what they want to hear.

Attorney for co-defendant #2: Your honor, for the record, what was the question asked?

. . .

The Court: The definition of assault, which is on one level, and on the next level under it, if says False Pretenses. So I am –

Attorney for co-defendant #1: Just for the record again, Your Honor, as for Mr. Thomas, I would interpret that as the jury wanting to be, and generally it is my position that we give the jury exactly what they ask for. If they ask for a definition of assault, it would be Mr. Thomas' position that we would give them, redefine assault for them and then redefine False Pretenses.

The Court: Thank you.

(Whereupon a note was sent to the jury at about 4:03 p.m.)

(Back on the record at about 4:06 p.m.)

The Court: In response to my note the jury sent back a verdict form marked with Assault with Intent to Rob Armed and Obtaining Money or Property Under False Pretenses. So I am going to read both of those charges back to them.

(Whereupon the jury enters the courtroom.)

The Court: Please be seated. Who is your foreperson? Miss Greenway?

Juror No. 3: Yes.

The Court: Okay. As I understand your inquiry, it was you wish me to read back to you the definition of Assault With Intent to Commit Robbery Armed and Obtaining Money or Property Under False Pretenses? Now if you want to say anything else, you are

going to have to go back and send me another note.

Is what I am saying to you correct? . . .

Juror No. 3: No, that is not it.

The Court: Then would you go back in the jury room. . . .

(Whereupon the jury was excused to continue deliberations at about 4:08 p.m.)

(Back on the record at about 4:19 p.m.)

The Court: What Miss Greenway said is, her note said, "Which does the sub-note, Obtaining Money or Property Under False Pretenses apply to be, apply to be guilty of False Pretenses?"

And I think she is referring to is, . . .I wrote guilty of False Pretenses in parentheses, and I put Obtaining Money or Property Under. Well, I know what that means, all of you know what that means. I think she thinks it means something different, because I didn't put it also under Attempting to Obtain Money Under False Pretenses. I didn't have Obtaining Money. So she wants to know what's the difference between these two, and one is simply the offense of Obtaining Money Under False Pretenses, and the second one is Attempting to Obtain Money Under False Pretenses, and she wants to know what the difference between those two are.

And she also wants it defined, and she also wants to have Assault with the Intent to Rob Being Armed defined.

(The jury enters the courtroom at about 4:22 p.m.)

The Court: Thank you very much, Miss Greenway.

I understand what you are saying now. On the verdict form it says, refer to False Pretenses, Obtaining Money or Property Under. And Under False, the next Attempted False Pretenses is it doesn't have Obtaining Money or Property Under. They are the same basic offenses. [Whereupon the Court proceeded to reinstruct the jury on the offenses of Assault with the Intent to Commit Robbery Armed and Obtaining Money Under False Pretenses].

Tr., Vol. V., pp. 117-122.

The standard established by Strickland requires a petitioner asserting an ineffective assistance of counsel claim to show that counsel's performance was deficient and that petitioner was prejudiced by that deficiency. However, the United States Supreme Court has held that, in certain circumstances where a petitioner claims ineffective assistance of counsel, the petitioner will not be required to make an independent showing of prejudice. United States v. Cronic, 466 U.S. 648, 658 (1984). Prejudice will be presumed where a defendant is denied the assistance of counsel at a critical stage in the proceedings. Id. at 659. The Supreme Court explained, "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." Id.

In the pending case, it is clear from the record before the Court, and Respondent does not dispute, that Petitioner's attorney was not present when the trial court gave a supplemental jury instruction. The giving of supplemental or additional jury instructions is a critical stage of a criminal proceeding during which Petitioner was entitled to the presence of counsel. Rushen v. Spain, 464 U.S. 114, 119, n.4 (1983); French v. Jones, 114 F. Supp. 2d 638, 643 (E.D. Mich. 2000), *after remand* 225 F.3d 658 (6th Cir. 2000). Thus, this Court concludes that Petitioner was deprived of his right to counsel, because his attorney was not present during the giving of supplemental jury instructions.

The Court now turns to the question whether Petitioner's appellate counsel was ineffective in failing to present this issue on appeal. The Court recognizes that a petitioner does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 754 (1983). Appellate counsel is charged with

"winnowing out weaker arguments on appeal and focusing on those more likely to prevail." Smith v. Murray, 477 U.S. 527, 536 (1986) (internal citation omitted). However, affording appellate counsel a great deal of discretion in determining which issues to raise on appeal and which to withhold does not mean that all such decisions made by appellate counsel are beyond reproach. Counsel cannot protect grossly incompetent decisions from examination simply by invoking the Supreme Court's decision in Jones v. Barnes. Jones v. Barnes does not absolve appellate counsel of the duty to exercise reasonable professional judgment in presenting claims on direct appellate review. "An appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal." U.S. v. Cook, 45 F.3d 388, 395 (10th Cir. 1995) (*quoting* Page v. U.S., 884 F.2d 300, 302 (7th Cir. 1989)); *see also* Manning v. Huffman, __ F.3d __, No. 99-3490 (6th Cir. Oct. 19, 2001).

The Sixth Circuit Court of Appeals has identified the following factors to be considered in determining whether appellate counsel was constitutionally ineffective in failing to raise certain issues on appeal:

1. Were the omitted issues significant and obvious?
2. Was there arguably contrary authority on the omitted issues?
3. Were the omitted issues clearly stronger than those presented?
4. Were the omitted issues objected to at trial?
5. Were the trial court's rulings subject to deference on appeal?

6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

7. What was appellate counsel's level of experience and expertise?

8. Did the petitioner and appellate counsel meet and go over possible issues?

9. Is there evidence that counsel reviewed all the facts?

10. Were the omitted issues dealt with in other assignments of error?

11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Mapes, 171 F.3d at 427-28.

Considering appellate counsel's failure to present the claim that Petitioner was not represented by counsel when the trial court gave supplemental jury instruction, in light of the factors articulated by the Sixth Circuit Court of Appeals in Mapes, the Court concludes that appellate counsel was ineffective in failing to present this claim on appeal.

The claim omitted by appellate counsel was significant and should have been obvious. The trial transcript clearly reflects trial counsel's absence during the giving of supplemental jury instructions. The United States Supreme Court decided U.S. v. Cronic in 1984. Petitioner was not convicted until 1992. Thus, appellate counsel should have been aware that absence of counsel during a critical stage of the proceedings "requires [a court] to conclude that a trial is unfair." Cronic, 466 U.S. at 659.

In addition, no countervailing authority existed which would have indicated that, under some circumstances, absence of counsel during a critical stage of criminal proceedings did not

amount to a constitutional violation. Moreover, the issue of the absence of counsel, a circumstance which renders a trial fundamentally unfair, was an obviously stronger issue than others presented by appellate counsel which involved jury instructions and sufficiency of the evidence.

While Petitioner's counsel did not object to the giving of supplemental jury instructions at trial, this did not in any way obviate appellate counsel's responsibility to raise this issue on appeal. Counsel's absence during the reinstruction obviously impeded his ability to object.

Next, appellate counsel's omission of this issue on appeal was not the result of a carefully crafted strategy designed to "winnow[] out weaker arguments on appeal and focus[] on those more likely to prevail." Smith, 477 U.S. at 536. Appellate counsel testified during the evidentiary hearing that he did not present this claim on appeal, because he failed to recognize any merit in the issue. He testified that he still considered it a non-issue. Finally, this Court can discern no reasonable justification for omitting this issue.

Accordingly, the Court determines that appellate counsel's omission of this issue on appeal fell outside the wide range of professionally competent assistance. In addition, Petitioner was prejudiced by this error because the issue counsel failed to raise presented a constitutional violation warranting relief. Thus, Petitioner has established cause and prejudice to excuse his procedural default. The Court further holds that Petitioner's trial was rendered fundamentally unfair by the absence of counsel during a critical state of the proceedings. Thus, Petitioner is entitled to habeas corpus relief with respect to this claim.

B. Ineffective Assistance of Counsel

Petitioner claims that his trial counsel was also ineffective for failing properly to investigate facts and interview witnesses who would have corroborated the defense theory.

Preliminarily, the Court observes that the question of trial counsel's failure to investigate could have been explored and answered at the trial court level. The Michigan Supreme Court, recognizing that the right to the assistance of counsel "has been jealously protected by the courts and is of critical importance" to any criminal defendant, has held that, where a request for substitute counsel is made, the trial court "must take special care to insure" that this right is protected. People v. Williams, 386 Mich. 565, 575-76 (1972); *see also* Fowler v. Collins, 253 F.3d 244 (6th Cir 2001) (describing function of trial judge when issue of adequacy of counsel is raised); U.S. v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001) (holding that district judge erred in, *inter alia*, failing to make a specific inquiry into the nature of defendant's problem with defense attorney).

Petitioner, on the day scheduled for trial, advised the trial court judge[3] that he was not satisfied with the representation his attorney was providing. Rather than conduct an inquiry into the exact nature of Petitioner's dissatisfaction, the trial court judge focused on Petitioner's previous experience with the criminal justice system, Petitioner's intelligence, and his ability to speak out on his own behalf. Had the trial court judge inquired into the specifics of Petitioner's complaints, the need for an evidentiary hearing in this Court would have been obviated.

Petitioner claims that trial counsel was ineffective in failing to contact his alibi witness

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[3] The same trial court judge presided over Petitioner's trial as presided over the trial in People v. Williams, *Id*.

Doris Oldham. Petitioner argues that if Ms. Oldham had testified, there is a reasonable probability that the result of the proceeding would have been different.

During the evidentiary hearing in this Court, Ms. Oldham testified that, on February 8, 1992, Petitioner called her home sometime between 11:00 a.m. and 12:00 noon, to tell her that her son, Petitioner's co-defendant, Darwyn Oldham, was in trouble. Ms. Oldham testified that she told Petitioner to come over to her house; he arrived fifteen to twenty minutes later. With regard to her attempts to contact Petitioner's trial attorney, Ms. Oldham testified that she called the attorney's office. She could not recall the number of times she called the office, but did recall that she made more than one call. She did not tell Petitioner's trial attorney that she could provide an alibi for Petitioner. Ms. Oldham attended every day of Petitioner's trial. She recalled speaking with Petitioner's attorney briefly one day, but did not recall the substance of that conversation. Ms. Oldham also testified that she and Petitioner were involved in a relationship in 1992 and that the relationship continues to date.

Based upon Ms. Oldham's testimony, the Court concludes that Petitioner has failed to establish that Ms. Oldham ever communicated to trial counsel that she could provide an alibi for Petitioner. In addition, Ms. Oldham's testimony as to when Petitioner was at her house does not rule out the possibility that Petitioner was at the crime scene before going to Ms. Oldham's house. Thus, because Ms. Oldham's testimony does not establish that Petitioner could not have been at the crime scene, the Court holds that Petitioner has failed to show that the result of the proceeding would have been different had Ms. Oldham testified.

Second, Petitioner provides medical records stating that he suffers from "gross cardiomegaly and moderate vascular congestion." He claims that his trial attorney was

ineffective in failing to investigate his medical history and present evidence of his heart condition. He argues that evidence of his heart condition would have contradicted the police officer's testimony that he ran from the house and jumped over a fence. However, while these records support Petitioner's argument that he has a heart condition, they do not support his contention that he consequently could not have run from the house and jumped over a fence. During the evidentiary hearing, Petitioner's counsel presented no evidence which addressed Petitioner's ability or inability to run or jump over a fence. Thus, the fact that counsel did not present medical records at trial does not undermine confidence in the outcome of the trial.

C. Failure to Produce *Res Gestae* Witness

Next, Petitioner claims that he is entitled to habeas corpus relief because the trial court failed to require the prosecution to produce a *res gestae* witness, Yvonne Stewart.

A claim that the prosecution failed to produce a *res gestae* witness concerns a perceived error of state law. *See* Smith v. Elo, 1999 WL 1045877 (6th Cir. Nov. 8, 1999). It is well-established that "'federal habeas corpus review does not lie for errors of state law,'" unless the error denies a petitioner fundamental fairness in the trial process. Estelle v. McGuire, 502 U.S. 62, 67 (1991), *quoting* Lewis v. Jeffers, 497 U.S. 764, 780 (1990). Petitioner's trial was not rendered fundamentally unfair because Yvonne Stewart was not called as a witness. Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

D. Admission of Similar Acts Testimony

Petitioner claims that the trial court erred in admitting testimony regarding another crime committed in the area in which similar operating procedures were employed. Petitioner presented this claim for the first time in his motion for relief from judgment in the trial court.

The trial court held that this claim was procedurally defaulted, because Petitioner had not established good cause and prejudice for failing to present the claim on direct review to the Michigan Court of Appeals. Therefore, as discussed above, the claim is barred from review by this Court unless Petitioner can establish cause and prejudice to excuse the procedural default.

Petitioner asserts as cause for his procedural default ineffective assistance of appellate counsel. Therefore, the Court first examines the merits of the claim to determine whether appellate counsel was ineffective in failing to raise it on direct appeal.

The similar acts evidence to which Petitioner objects involves testimony regarding a robbery at another Detroit city house where the perpetrators, one of whom was identified as Petitioner, gained entry into the house by claiming to be federal agents. Kenneth Davis testified that, on November 23, 1991, at approximately 1:00 p.m., in the afternoon, two men whom he identified as Petitioner and co-defendant Travis Thomas knocked on the front door to his house. Mr. Davis thought that the two men were Jehovah's Witnesses and ignored their knocking. But the knocking persisted. Mr. Davis went to the front door and Petitioner identified himself and co-defendant Thomas as federal marshals. Mr. Davis testified that he then opened the door and Petitioner showed him a badge, a nine-millimeter handgun, and a piece of paper with Mr. Davis and his wife's names on it. Petitioner told Mr. Davis that the piece of paper was a search warrant, and that they were going to search the Davis house in connection with a homicide investigation. Mr. Davis and his wife were shepherded into the bathroom of their house. He saw co-defendant Thomas and other men carrying things out of his house. He testified that wedding rings, jewelry and other items were taken from the house.

Before allowing this testimony, the trial court gave the following instruction to the jury:

> Ladies and gentlemen of the jury, Mr. Davis is our next witness and he is going to testify to something we call a similar act. That is, the People have made an allegation that in addition to the offense, several offenses charged here, that the Defendants, that is two of them, Mr. Caver and Mr. Thomas, have acted in a similar way before. And the law permits under some circumstances to have that evidence introduced to you so that you may consider it in connection with the charges that are filed in this case.
> Again, the testimony is described in the law as criminal [sic] acts' testimony. That is, that these Defendants, Mr. Caver and Mr. Thomas, acted in a similar way on a different occasion.
>
> . . . .
>
> Ladies of gentlemen of the jury, I do want to say this to you: That facts which Mr. Davis is testifying, as I understand it, will be a similar criminal act. And I will say to you now that neither Mr. Caver nor Mr. Thomas has at this time been convicted of having committed this act. And again, purpose of the admission of the testimony is to identify the Defendants, to establish what they intended to do, to assist you in establishing what they intended to do in this case. And you are not to decide whether they are either guilty or not guilty of the matter to which Mr. Davis will be testifying, but it is simply offered to you as evidence to be used in this case, to make your necessary determinations in this case.

Tr., Vol. IV, pp. 24-25.

"'[F]ederal habeas corpus review does not lie for errors of state law.'" Estelle v. McGuire, 502 U.S. 62, 67 (1991), *quoting* Louis v. Jeffers, 497 U.S. 764, 780 (1990). "Habeas review does not encompass state court rulings on the admission of evidence unless there is a constitutional violation." Clemmons v. Sowders, 34 F.3d 352, 357 (6th Cir. 1994), *citing* Fuson v. Jago, 773 F.2d 55, 59 (6th Cir. 1985), *cert. denied* 478 U.S. 1020 (1986). *See also* Estelle, 502 U.S. at 72 (holding that a federal court may not grant habeas corpus relief simply on the basis that a trial court incorrectly interpreted state evidence rules to allow admission of prior bad acts evidence). "When an error involving the violation of a state court rule rises to the level of

depriving the defendant of fundamental fairness, the claim is remediable on a petition for habeas corpus relief." Matlock v. Rose, 731 F.2d 1236, 1242 (6th Cir. 1984) (internal citations omitted).

The Sixth Circuit Court of Appeals has held that a trial court does not violate a defendant's constitutional rights when the court admits "other acts" evidence, which is intended to show a pattern or practice of behavior linking the defendant to the charges for which he was on trial. Coleman v. Mitchell, 244 F.3d 533, 542 (6th Cir. 2001).

In holding that the other acts evidence admissible, the trial court reasoned that the evidence was admissible to show the intent, motive and scheme of the defendants, who were interrupted before they could complete the robbery. Kenneth Davis positively identified Petitioner as one of the men who robbed his house. The similarities between the robbery at his house and the incident at the Steward house are many. Both incidents involved men impersonating federal officers and claiming to have a warrant to search the house. The men were dressed similarly in both incidents. The method of gaining entry into the home was the same. The many similarities in both cases tend to show a plan to gain entry to a house by posing as federal agents with search warrants in the process of investigating a murder. And, while the homeowner and residents are preoccupied with one or two of the "agents," have additional men enter the house, ransack it, and confiscate money, jewelry and other valuables. The trial court held that this testimony was material to the case and not unfairly prejudicial.

This Court agrees that the "other acts" evidence was relevant to the pending case and tended to show the intent and scheme of the defendants in this case. Thus, the admission of Mr. Davis's testimony was not fundamentally unfair and Petitioner is therefore not entitled to habeas corpus relief with respect to this claim.

E. Jury Instruction Regarding Aiding and Abetting

Finally, Petitioner claims that the instructions regarding aiding and abetting were constitutionally inadequate because they did not accurately reflect the mental intent requirement.

An erroneous jury instruction warrants habeas corpus relief only where the instruction "'so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72 (1991) *(quoting* Cupp v. Naughten, 414 U.S. 141, 147 (1973)). "[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned', but that it violated some [constitutional] right'". Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Further, "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (*quoting* Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

The trial court instructed the jury regarding aiding in abetting, in part:

> I say to you first in this case so that you will understand, I said each person had to be considered separately. They have to be considered separately. You must also decide in your consideration whether all three of these men were acting together, and you will examine the evidence to make that determination. If you find that they were acting together, it doesn't make any difference which one did which act. If they were acting together, each is as responsible as the other.
>
> . . .
>
> However, if all three – let's take the first offense of Robbery Armed, and if someone among them had a gun, even if there was someone among them who had no gun, if you find that a gun was used, all three would be responsible for the offense of Robbery Armed, and all of the lesser included offenses under Robbery Armed. The only thing that that person would not be responsible

> for, if he did not actually have a gun himself, would be the fifth Count, which is Possession of a Firearm in the Commission of a Felony.

Tr., Vol. V., p. 101.

The last state court to issue a reasoned opinion regarding this claim, the Michigan Court of Appeals, stated in pertinent part:

> Caver contends that the court's instructions regarding aiding and abetting, to which he did not object at trial, did not properly explain the mental intent necessary for conviction as an aider and abettor. An alleged instructional error such as this may not be considered by an appellate court unless the error could have been decisive of the outcome. People v. Grant, 445 Mich. 535 (1994). Considering the evidence of Caver's role in the crime and his participation in the entire episode, we conclude the alleged error could not have been decisive of the outcome, and decline to review the issue further. Caver's conviction is affirmed.

People v. Caver, slip op. at 2.

Petitioner has failed to establish that the state court's determination was an unreasonable application of clearly established Federal law or that it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence. Nor has Petitioner shown that the trial court's jury instruction infected his entire trial to the extent that he was denied his constitutional right to due process. Accordingly, he is not entitled to habeas corpus relief with respect to this claim.

VI. Conclusion

For the foregoing reasons, **IT IS ORDERED** that a writ of habeas corpus is **GRANTED**. Unless a date for a new trial is scheduled within ninety days, Petitioner Caver must be unconditionally released.

/s/
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATE: October 19, 2001